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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 644

JAMES L. SKINNER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JAMES L. SKINNER,
Petitioner, *Pro Se*,
29 Tioga Walk,
Rockaway Point,
New York, N. Y.

249 Press of Fremont Payne, Inc., 79 Washington St., N. Y.—BOwling Green 9-8155

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Argument

1. Assuming, without admitting, that the Government's contention, namely, "the amended information merely specified four subsections of Chapter 51"; and therefore the amended information did not convert the information into one charging four separate offenses, then the original information was a good information since it merely specified 693 sections of Chapter 51 that the use of the sugar would contravene.

It is true, as the Court of Appeals pointed out in its opinion, that petitioner was not charged with having violated any of the [sub] sections. Petitioner never did make any such claim, either upon the trial or upon the appeal. Petitioner did claim and now claims that any prosecution under Section 5686(b) must allege in the information (1). Possession of * * * property, and (2) that it was intended for use in violation of a specific provision or regulation of Chapter 51.

Petitioner has not been able to find a reported case wherein the precise question has been passed upon. However, petitioner does believe that *Morgan* v. *Devine*, 237 U. S. 632, 641, supports his contention that the amended information in this case charges more than one offense in one count. In that case, this Court stated:

> "As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by statutes. * * *"

(See also, *Gore* v. *United States*, 357 U. S. 386, 389).

Petitioner contends that an information that merely charged "possession of * * * property, to wit, sugar" would not charge an offense under Section 5686(b) of Chapter 51, U. S. C. The information to be a valid one must, in addition, charge an intent to be used in violation of a single specified provision or regulation of Chapter 51.

Petitioner contends, relying on his interpretation of the reasoning of this Court in *Morgan* v. *Devine* (*supra*), that unless the same evidence that would prove that he possessed the sugar with intent to use in violation of Section

5174(a) of Chapter 51 would also prove possession with intent to use in violation of Section 5180, and 5606, and 5216, then the amended information does charge four separate and distinct offenses.

A reading of Section 5174(a) together with a reading of Section 5180, 5606 and 5216, all of which are set forth in the petition heretofore filed, will disclose that the proof necessary to establish intent to possess the sugar to be used in violation of Section 5174(a) is entirely different from the proof required to establish intent to possess the sugar to be used in violation of Section 5180, or Section 5606, or Section 5216.

The District Court, Byers, J., ruled the original information defective and directed that the information be amended to specify the precise statute or regulation that the defendant (petitioner) is charged with violating.

Petitioner contends that the cases cited by the Government, *United States* v. *Lennon*, 246 F. 2d 24, 27 (C.A. 2); *Silkworth* v. *United States*, 10 F. 2d 711, 714 (C.A. 2), and *Whitcombe* v. *United States*, 90 F. 2d 290, 293 (C.A. 3) are not in point.

2. The Government contends that the order of Judge Abruzzo suppresses "the use of evidence resulting from the unlawful search and seizure" of September 7, 1956 in which petitioner's Ford Truck, the 20,000 pounds of sugar purchased in the last load on August 23, 1956, the certificate of registration for the truck, and a paid license fee receipt were found. That none of that evidence was introduced.

The Government's brief in opposition is completely silent with respect to the doctrine of res judicata forcefully presented in petitioner's brief in the Court of Appeals.

The doctrine of res judicata was squarely presented to the Court of Appeals. The closing paragraph of the

brief in the Court of Appeals states:

> "As heretofore stated, the testimony adduced at the hearing before Judge Abruzzo embraced all of the above evidence. All of this evidence was suppressed and the Government was prohibited from using such evidence in any manner whatsoever. The opinion of Judge Abruzzo characterizes all of this evidence as merely suspicious. Judge Byers, in the use of this evidence on the trial had before him, committed error. Judge Byers is bound by the opinion and decision of Judge Abruzzo."

The Government admits the trial court relied on the testimony given at the pre-trial hearing to suppress, but that the stipulation permitted the trial court (Byers, J.) to again consider the same evidence adduced upon the hearing before Judge Abruzzo, without regard to any rulings, opinion or decision made by Judge Abruzzo.

Petitioner contends that the Government's interpretation of the stipulation is erroneous. The stipulation was not reduced to a formality, i.e., it was not made in writing, signed by both attorneys and approved by the Court. In fact, Judge Byers, at page 30, Trial Record, stated:

> "I said the record made before Judge Abruzzo is stipulated to be part of the record of this trial, reserving to either party the right to supplement that testimony."

Petitioner contends that the record made before Judge Abruzzo, with or without the stipulation, is a part of the record of the trial. If the decision on the motion to suppress was adverse to petitioner, the order denying suppression could be appealed by petitioner. This motion was interlocutory and being made after the filing of the information was a part of the trial record. (*United States* v.

Dilli, 2 Cir. 1947, 159 F. 2d 818, 820, aff'd 332 U. S. 581, 68 S. Ct. 222, 92 L. Ed. 210; *Carroll v. United States*, 354 U. S. 394, 404.)

The Government in the brief in opposition to this petition takes a different position from the Court of Appeals with respect to the evidence used upon the trial. The Court of Appeals, in the *per curiam* opinion states:

> "Appellant has pointed to no instance where evidence suppressed by Judge Abruzzo was used in appellant's trial. * * *"

In the Government's brief it is stated:

> "Although the trial court relied on the testimony given at the pre-trial hearing to suppress, it did so pursuant to a stipulation, entered into at the beginning of the trial, that such testimony should be a part of the trial record" (R. 31, 25-28, 121-123, 149).

The Government's position before this Court is that the Court of Appeals erroneously decided that Judge Byers did not use evidence that was suppressed by Judge Abruzzo. That Judge Byers correctly used testimony adduced at the pre-trial hearing before Judge Abruzzo, which testimony is the basis for Judge Abruzzo's opinion and decision. That the stipulation entered into between the United States Attorney and the attorney for petitioner gave Judge Byers the right to again consider all the testimony adduced upon the pre-trial hearing before Judge Abruzzo. It gave Judge Byers the right to independently rule, without regard to Judge Abruzzo's rulings, opinion and decision, upon all of the testimony. This is contrary to the ruling of Judge Byers. Judge Byers ruled that he could again use the same testimony since petitioner did not move to strike this testimony at any time during or after the hearing before Judge Abruzzo and that Judge Abruzzo did not, of his own motion, strike out all the testimony.

Petitioner respectfully calls the attention of this Court to page 28, wherein the following appears:

"Mr. Aronstein: Your Honor must bear in mind that all this testimony of these agents, all this evidence is evidence that was suppressed.

The Court: I understand that the evidence was suppressed."

Petitioner contends that the aforesaid clearly demonstrates that the stipulation did not again permit Judge Byers to receive the evidence adduced upon the hearing before Judge Abruzzo and disregard Judge Abruzzo's opinion and decision upon the motion to suppress.

Petitioner urges that the fact that Judge Byers erroneously construed the order of Judge Abruzzo does not mean that petitioner stipulated that the evidence taken on the pre-trial hearing could again be used by Judge Byers upon the trial without respect to Judge Abruzzo's opinion and order. The following appears at pages 36-38 of the trial record:

"Mr. Aronstein: I move to strike out the evidence with respect to October 23rd on the ground that has been suppressed.

The Court: October?

Mr. Aronstein: No, on August 23rd.

The Court : August 23rd?

Mr. Aronstein: On the ground that evidence has been suppressed.

The Court: Evidence has been suppressed, but the testimony hasn't been directed to be stricken.

Oh, no. Motion denied.

• • •

The Court: Well, let me see. I have the order here. The opinion says only the motion to suppress the evidence resulting from the search and seizure is granted.

This isn't testimony resulting from the search and seizure. Motion denied.

Mr. Aronstein: Exception."

Petitioner contends that Judge Byers, in ruling that Judge Abruzzo merely suppressed the evidence but the testimony adduced upon the pre-trial hearing was not stricken by petitioner by appropriate motion and therefore, all such testimony can again be used by the Government upon the trial, either by again having the witnesses testify upon the trial or by reference to the testimony given upon the pre-trial hearing, and that Judge Byers can now, at the trial, decide questions of fact, the very same questions of fact that were decided by Judge Abruzzo in favor of petitioner, and decide these questions of fact in favor of the Government.

The fallacy of the ruling of Judge Byers is self evident. If the ruling is correct then petitioner would be required, after the motion on the pre-trial hearing was decided, to make a motion to re-open the hearing, then move to strike out all the testimony adduced upon the hearing, excluding the physical exhibits, which, according to the ruling of Judge Byers, have been suppressed. If Judge Abruzzo denied the motion to re-open the hearing or if the hearing was re-opened and Judge Abruzzo denied the motion to strike out all the oral testimony adduced upon the hearing, then the Government could again use this evidence upon the trial. Judge Byers then could pass upon the same questions of fact and law that were passed upon by Judge Abruzzo and make different findings of fact and law in favor of the Government.

Judge Byers is confused with respect to the meaning of evidence. Testimony is evidence that is legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation. (The Consolidated Webster Encyclopedic Dictionary; Evidence.)

Petitioner urges that this ruling of Judge Byers is contrary to the ruling of this Court in *Steele* v. *United States, No. 2*, 267 U. S. 505, 507, 510-511. In *Steele* v. *United States, No. 2*, *Steele*, upon the trial, sought to have submitted to the jury the testimony of Agent Einstein, that was the basis for securing the search warrant, with instructions to the jury by the Trial Court, that if the jury found that the testimony of Agent Einstein, i.e., that he observed the name "whiskey" stenciled on cases brought into the premises, and that he ascertained by his own investigation that there was no permit for the legal storage of whiskey on those premises did not constitute probable cause, the jury should ignore the evidence resulting from the search and seizure and acquit the defendant. This Court held, at page 507:

> "The refusal to vacate the search warrant and to return the liquor seized was a final decree. The question is therefore res judicata as against him."

This Court, further said, at pages 510-511:

> "* * * The second answer is that the question of the competency of the evidence of the whiskey by reason of the legality or otherwise of its seizure was a question of fact and law for the Court and not for the jury. * * *"

Petitioner concedes that Judge Byers, with or without the stipulation, would have the right to scrutinize the testimony and the exhibits adduced at the hearing before Judge Abruzzo to ascertain exactly what testimony and exhibits had already been received and passed upon by Judge Abruzzo. Judge Byers, petitioner assumes, could do this by reference to the record of the proceedings before Judge Abruzzo or by having the same witnesses testify and the same exhibits received upon the trial. But whichever procedure is followed by Judge Byers, he is

bound by the rulings, opinion and decision of Judge Abruzzo. Whatever rulings on the law and the facts, whatever opinion and decision was made by Judge Abruzzo is absolutely binding upon Judge Byers. (*Steele v. United States, supra.*)

Petitioner respectfully calls the attention of this Court to P. 8, Government's brief in opposition, wherein it states:

> "Moreover, when petitioner learned of the goverment investigation, he resorted to the deceptive tactic of obtaining from the seller a pre-dated bill for the August 23rd load of sugar for an amount $1,000 less that he had paid for it. * * *"

The Government is in error with respect to the above statement. 1. Petitioner did not resort to any deceptive tactics. He secured the paid bill after the agents seized his truck and the sugar at the request of his lawyer so that he could establish ownership of the sugar, a necessary allegation on the various motions made by petitioner long before any criminal prosecution was instituted by the Government on the civil side of the Court.

The statement in the Government's brief in opposition that petitioner "deceptively obtained a pre-dated bill" is erroneous. Petitioner purchased the sugar on August 23rd, 1956. At the time of the purchase he did not obtain a paid bill. After the Government agents seized the sugar on September 7th, 1956, petitioner went to the sellers and told them he needed a paid bill in order to establish ownership in a proceeding on the civil side of the Court. The bill was not pre-dated. It was dated the same day the sugar was purchased and paid for. Furthermore, petitioner did not secure a bill in an amount $1,000 less than he paid for the sugar. Petitioner testified he paid $1,800 and Krain testified he paid $1,900 a difference of only $100 (pp. 264, 302-303; Trial Record).

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted.

JAMES L. SKINNER,
Petitioner, *pro se.*